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REPLY BRIEF FOR PETITIONER.

SUPREME COURT OF THE UNITED STATES.

October Term, 1905.

No. 213.

FIRST NATIONAL BANK OF BALTIMORE, PETITIONER,

vs.

WILLIAM H. STAAKE, TRUSTEE OF C. K. BAIRD & COMPANY, BANKRUPTS, ET AL.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

(19,683.)

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REPLY BRIEF FOR PETITIONER.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

In respondent's brief (p 3) the legal question which it is stated is involved, is as follows:

> "The question for the consideration of this Court is whether a creditor who levies an attachment on property on an insolvent debtor, within four months of the petition on which the debtor is adjudged a bankrupt, can retain the fruits of the attachment for himself alone, or must permit the general creditor of the bankrupt to share therein."

The general abstract proposition as stated, we trust we may never be guilty of the absurdity of denying; as the legal question of this case, however, it is inapplicable, it is incomplete, incorrect, and unfair. It assumes that the attachment in the case at bar was levied upon and is to be enforced against property which is a part of the bankrupt's estate.

The proposition so modestly assumed is in fact, the point in dispute, the basis of the litigation, the core of this case. When this court disposes of that proposition and holds that the property attached is, or is not, a part of the bankrupt's estate within the meaning of the Act, it will have decided this case.

The abandonment of the positions heretofore taken and insisted upon by respondent and the substitution of bald assumption for facts and law, is indeed a surprise.

The brief filed on behalf of respondents ignores the most pertinent fact of this case, to-wit, the contract of December 7, 1899. From the statements contained in the brief, and the inferences drawn therefrom, one, would infer, and it seems, that the impression was intended to be made that the **sale** and the execution and **delivery** of the deed were cotemporaneous.

It is desired to correct this impression. The vital importance in this case of the contract in question will be appreciated when its effect under the state law is given. The contract in question was for the sale of the attached property, and if recorded as required by the registry statutes would have the same force and effect as a deed. The registry statutes of Virginia provide —

> "Sec. 2464. IF IN WRITING AND RECORDED, AS VALID DEEDS—Any such contract if in writing, shall, from the time it is duly admitted to record, be, as against creditors and purchasers, as valid as if the contract was a deed conveying the estate or interest embraced in the contract."

It is submitted that this Court, except where the Constitution, treaties, or statutes of the United States, otherwise require or provide, adopts the local law of real property as ascertained by the decisions of the state court, whether those decisions are grounded on the construction of the statutes of the state, or form a part of the unwritten law of the state, which have become a fixed rule of property.

Jackson vs. Chew, 12 Wheat. 167. (6. L. Ed. 583.)

Under the law of Virginia, "if a contract is made for

the sale of lands, the seller is immediately regarded in equity **as trustee of the land for the purchaser**, and the purchaser as a trustee of the money for the seller. The vendee's interest, although no conveyance has been made, is treated as **real estate** and is devisable and descendible accordingly; and the vendor's interest is **personalty** and passes and is disposed of as such."

First Lomax Dig. p 200.

Moore's Admr. vs. Randolph 6 Leigh 180.

Withers vs. Carter 4 Grattan 414.

2 Minors Inst. 2 Ed. 191.

The contract in question having been executed more than twelve months prior to the filing of the petition in bankruptcy against either of the parties thereto, the status of the property is unquestionably fixed by the laws of Virginia.

An analysis of the brief of respondent's in so far as it attempts to deal with the status of the property attached, will show that two questions are presented. one question is based upon an inference which it is attempted to draw from the facts, the other is a question of law.

(1) The inferences drawn and then asserted as facts in the brief are, that the bankrupt Baird did not receive the consideration to which he was entitled for the West End Furnace property, but that from such consideration **was deducted the amount of the attachment**, and that the conveyance of November 5, 1900, was **fraudulent.**

In the brief, pages 5 and 6, it is stated "But the deed of conveyance having been delivered on November 5, 1900, subsequent to the levy of the attachments, for a **then** fair consideration" (record, No. 213, p 12, sec. 9), the consideration received by the insolvent Baird, for the property attached, whatever its amount, must have been diminished by the exact amount of the claims sought to be recovered by the attaching creditors, and thus, in legal effect, Baird's conveyance was the specific application by an insolvent debtor of a part of his property to pay in full the claims of a few creditors, in fraud of the Bankruptcy Act, and the enforcement of those

attachments would work preferences in their favor over his other creditors."

The statement that the deed was "for a then fair consideration," is in the facts agreed between the trustee of Baird, the trustee of the Roanoke Furnace Company and your petitioner. The only effect and meaning is and was that the consideration for which the deed passed was fair to all parties; that is, the rights of no party to the agreement were prejudiced thereby. By no reasonable or fair construction can it be made to refer to the passage of a consideration from the Furnace Company to Baird as of the date? The true consideration for the deed and its prior passage quoad Baird is conclusively shown in the same clause of the agreement.

The conclusion which is drawn to the effect that the consideration received by the insolvent Baird was diminished to the extent of the amount of the attachment, is without reason and in direct conflict with the agreed facts and with the injected facts, as will hereafter be demonstrated. It is contended by respondent as is stated in the above quotation from the brief, that the conveyance from Baird to the Furnace Company was "in fraud of the Bankruptcy Act." In the same sentence of the agreed facts in which is found the language from which the inference is attempted to be drawn, it is stated that, **the conveyance was valid and not affected by the bankruptcy proceedings.**

The statement in the agreed facts is as follows: (R. p 10 89). "That the deed of November 5, 1900, from said Baird to the Roanoke Furnace Company was a **valid conveyance** to a purchaser in good faith, for a then fair consideration, and **was not affected** by the **bankruptcy proceedings hereinbefore mentioned.**"

It will thus be seen that by the express terms of the agreed facts the consideration was a **fair one, the conveyance was valid** and **was not affected by the Bankruptcy Act,** the statement made in the brief is **that the conveyance was fraudulent,** and upon this statement, though made in direct oppositon to the agreed facts, the whole argument invoking the benefit of sec. 67-e of the Bankruptcy Act, is based. The considera-

tion as expressed in the deed (R. p 10 §9) is as follows:

> "That in consideration of the issueing and delivering of certain shares of the capital stock to the amount of $500,000.00 of the said Roanoke Furnace Company, **in pursuance of a certain agreement between the parties hereto, the receipt heretofore** of the certificates for which shares is hereby formally acknowledged. * * * * It is expressly understood and agreed, however, that this conveyance has been made subject to the payment by the Roanoke Furnace Company of the **balance** of the purchase money due, or to become due, to Robert E. Tod on the land of which the hereby granted premises are a part, the payment of which balance of purchase money has been assumed by the said Roanoke Furnace Company."

The above quotation is followed in the agreed facts by this statement:

> "That as of November 5, 1900, the amount due Robert E. Tod was something over $40,000.00, which amount was subsequently paid out of the proceeds from the sale of the property of the Roanoke Furnace Company."

There is absolutely nothing in this record which will justify even the inference that there was any diminution whatever of the purchase price, because of the levying of the attachments. It is not in the record, and has never before been intimated or suggested that Baird was to receive any consideration other than the $500,000.00 of stock of the Furnace Company, and this stock he received long prior to the levying of the attachment.

For the convenience of this Court I here insert the findings of fact on this point as made by the District Court, and the Circuit Court of Appeals:

The District Court in its findings of facts (R. p. 16) uses this language:

> "On December 7, 1899, Baird, by written contract, sold the furnace property to the Roanoke

Furnace Company, in consideration **of the issue to Baird of certain shares of the vendee's capital stock** and the assumption by the vendee of a purchase money debt owing on the furnace by Baird to R. E. Tod.

"This contract was never recorded. On November 5, 1900, Baird executed and delivered to the Roanoke Furnace Company **a deed in pursuance of the above mentioned contract,** conveying the furnace property, which deed was forthwith recorded."

The attention of the Court is called to the fact, that when this finding was made by the District Court, it had the **original** contract before it.

The Circuit Court of Appeals on this point made this statement of facts: (R. p. 26.)

"Chester R. Baird, trading as C. R. Baird & Co., on December 7, 1899, owned certain real estate in Virginia known as the West End Furnace property, and as of said date he sold it to the Roanoke Furnace Company, subject to certain existing encumbrances, and **executed a contract in writing and received from the Roanoke Furnace Company all the consideration to which he was entitled under the contract, to-wit: shares amounting to $500,000.00 of the capital stock of the said Roanoke Furnace Company.**

"Under the contract of sale the Roanoke Furnace Company took immediate possession in December 1899, of the property so purchased," etc.

It is further stated in the brief, (p. 6) that "there are assertions in the briefs of the petitioners not warrented by the agreements." It would be unseemly to make the reply which the above statement merits.

Respondents state that in the brief of the Bank of Baltimore, "it is claimed that the property of Baird was parted with at the time of the contract of sale, for a fair consideration and without diminution because of the attachment; whereas, in the agreement it was

stated that the deed of November 5, 1900, was a valid conveyance for a then fair consideration."

A sufficient answer to this statement is, that the facts show (see statement of Morris, J., supra,) that the property was, by written contract, sold by Baird on the 7th day of December, 1899; that he received all of the consideration to which he was entitled under the contract; that he surrendered the possession of the property.

The record further shows that the attachment was not levied until the 26th day of October, 1900, over ten months subsequent to the contract of sale and purchase; that the sale as made by that contract was for a fair consideration has never been questioned, either in the pleadings or in the facts agreed, on the contrary, the deed which was made on November 5, 1900, in pursuance of that contract, is admittedly valid, that is, **it is stated to be valid in the agreed facts, though stated in the brief filed in this court to be fraudulent.**

It is presumed that the above quotation taken from the respondent's brief was really made for the sole purpose of providing an excuse for injecting into the case, **through the brief,** a statement to the effect that Baird was forced to pay for the Furnace Company to Tod, the original owner of the property, on account of his reserved vendor's line, the sum of $85,000.00. A sufficient and conclusive reply to this "injected fact" is; that it was alleged in the **original petition** filed in the District Court, (R. p 6) and **specifically denied in the answer** to that petition (R. p 14) and abandoned by respondents, apparently for lack of evidence, with which to support it. After asserting the payment of $85,000.00 to Tod by Baird for the Roanoke Furnace Company, the brief (p 6) adds.—

"This money was never repaid to Baird, **but the property charged with the attachments and with Tod's lien, thus reduced to $40,000.00,** was conveyed by the deed of November 5, 1900."

Take the above assertion and that of "diminution of purchase price because of the attachment," and the allegation of the petition (originating this case) filed February 27, 1900 (R. p 6) and state the account--

Roanoke Furnace Company

To C. R. BAIRD, Dr.

	To amt. paid Tod acct. vendor's lien, (assumed by		
1900.	Ro. Furn. Co.)	$85,000	
Nov. 5.	By amt. of rebate on acct. of attachments, ...		$45,000
1903.			
Feb. 27	To bal. due as per petition,		85,000
		$85,000	$130,000

According to the above account, either their statement of "real facts" is incorrect, or their claim of diminution because of the attachments is absurd. The court is asked to bear in mind that the only consideration which was to pass from the Roanoke Furnace Company to Baird under the contract was **stock**, that Baird **received the stock**, that one theory of the brief is that the Roanoke Furnace Company again became indebted to Baird because of payments subsequently made by him to Tod. Assuming for the sake of argument only, that this payment of $85,000.00 was made by Baird to Tod, petitioner did not attach this debt, and further Tod's debt was secured by a vendor's lien, and if Baird made such payment he was entitled to that lien, which was the first encumbrance upon the property. The agreed facts (R. p11, sec. 11) state:—

"That the proceeds from the sale of the property which was conveyed by the deed of November 5, 1900, from C. R. Baird to the Roanoke Furnace Company were not only sufficient to pay off and discharge all liens thereon prior to that of the First National Bank of Baltimore, but were also sufficient to pay off and discharge the lien of said bank, as evidenced by said attachment, principal, interest and costs."

There can be no question that if Baird had this prior lien he has been paid.

In concluding our reply to this branch of the case as asserted by the brief, we ask that this case be decided upon the record, and not upon "injected facts," or inferences which are in direct conflict with the agreed facts.

(2) The proposition of law asserted (brief p 13) is, that because of the purchaser's failure to record the evidence of its purchase as required by the Registry Statutes of Virginia, the attachment by a creditor of the vendor became a lien, that to the extent of such lien the subsequent alienation was void as to the attaching creditor; that the property attached to the extent of the lien acquired remained the property of the vendor **as to such creditor.** They say, therefore, the lien is against property which is a part of Baird's estate.

We reply that the premises do not justify the conclusion.

(See Parker vs. Dillord, et als. 75 Va. 418).

The proposition that, a lien upon property, to the extent of its amount creates a beneficial ownership in that property in the debtor against his prior valid contract of sale and against his subsequent valid deed, for a full and fair consideration, is to me incomprehensible. Such a rule of law would, as was in effect said by the dissenting judge (of the C. C. A.), "convert a liability into an asset." It would create a new and novel form of ownership, neither founded in reason, sustained by authority, or in any manner heretofore known to the law. In the case at bar the lien was petitioner's, and the property upon which it was acquired was that of the Roanoke Furnace Company and had been for over a year prior to the filing of the petition in bankruptcy against Baird.

The case of March, Price & Co. vs. Chambers et al., 30 Grat. 299, (cited in respondent's brief, p 13), is the law of Virginia; and emphasizes that the right is the lien creditors only, that case was before us when the agreed facts were prepared, and in consequence, it was therein stated: (R. p 10, art. 8).

> "That inasmuch as neither the contract nor deed from C. R. Baird to the Roanoke Furnace Company had been recorded at the time of the levying of the said attachment and filing of **lis pendens** by said bank, the property conveyed by such deed is to be deemed and taken under the laws of the state of

Virginia to be the property of the said C. R. Baird, **quoad the said attachment and no further.**"

We assert that the Registry Statute creates no right of property in the vendor.

The effect of the statute can be stated by showing the rights of parties in a case to which the statute does not apply. The case of Floyd, Trustee, vs. Harding, et al., 28 Grat. 407, was a case which arose in Virginia where the sale was by parol prior to the statute requiring all contracts for the sale of land to be in writing. Judge Staples, who delivered the opinion of the court, after first stating "the purchaser is regarded as the real beneficial owner of the estate, and the vendor a mere trustee of the legal title for his benefit," said:

> "I speak now without reference to the recording acts. That the equitable estate of the purchaser is good against creditors of the vendor is incontrovertible. It has been over and over again decided that the judgment creditor can acquire no better right to the estate than the debtor himself has when the judgment is recovered. He takes it subject to every liability under which the debtor held it, and subject to all the equities which exist at the time in favor of third persons; and a court of chancery will limit the lien of the judgment to the **actual interest** which the debtor has in the estate."

The effect of the Registry Acts is to give to **a creditor** the right to impress with a lien the property of a party other than his debtor if the legal title stands of record in the name of that debtor. In the case at bar the bankrupt Baird had no beneficial interest in the property which was actually attached. Whatever claim, while we deny there was any, that he may have had against the Furnace Company, was personalty, and the property attached, the reality, was the property of the Roanoke Furnace Company. The attachment became a lien because of its failure to comply with the Registry Statutes of Virginia and record the evidence of its purchase.

The Circuit Court of Appeals recognized that in this case Baird had no interest, that the property attached was not Baird's, and it was driven to this position,—"that a creditor might obtain by reason of his being a creditor of the bankrupt, a prohibited lien against property, which would not, if unaffected, pass to the trustee in bankruptcy." To this proposition we replied in our opening brief, page 19-20.

Respondents take the position in their brief that when the lien was acquired by petitioner, it was enforcing a right common to all the creditors of Baird, and therefore, should inure to the benefit of all; this contention is erroneous. The unrecorded contract of sale was void only as to those creditors who acquired a lien prior to its recordation. The right to acquire a lien was an inchoate one, at most, the general creditor had only a mere right or capacity to acquire a lien; this inchoate right under the laws of Virginia terminates as to the general creditors upon the happening of either of two events, the death of the grantor, (Dulaney vs. Willis, 95 Va. 606,) or the recordation by the purchaser of the evidence of purchase. The whole theory of respondent's case is this: that because of the acquisition of the lien by petitioner, **quoad it,** the subsequently recorded conveyance is void. They say, therefore, to the extent of that lien the property remains that of the debtor, and the appropriation of that property by petitioner will create a preference. This ignores the status of the property under the laws of Virginia; when the lien was acquired; the **legal title only** was in Baird, and the **beneficial interest** in the Roanoke Furnace Company. All that could pass from Baird by the subsequent deed was the legal title, this legal title and this alone, is void as to the previously acquired lien on the beneficial interest. Having stated our views in the opening brief, upon what constitutes a preference and the authority relied upon, we make no further comment as to that.

It is stated in the brief (p 15)"*****Counsel for the attaching creditors have been quite unable to show why the explicit provisions of Section 67-f of the Act should

not applies to this case." Our reply is, that to hold that section 67-f can apply, it must first be held, that a creditor who acquired a lien because of the failure of a purchaser from his debtor to comply with a registry statute, thereby to the extent of the lien created a beneficial interest in the attached property in his debtor, and that to hold this, is to extend a legal fiction to an absurdity.

It is further stated in the brief that we have been unable to show any statement of facts, hypothetical of course, to which this provision of section 67-f would apply. To this we reply, in our opinion the object of section 67-f was to prevent preferences as between the **general creditors** of a bankrupt **out of his estate** and to facilitate administration and thus preserve the estate of the bankrupt. An illustration of a proper application in our judgment of the section in question can be made in this case by supposing the fact, that just prior to the filing of the attachments now being litigated, a creditor of the Roanoke Furnace Company had placed an attachment upon the property, (as any creditor of the Roanoke Furnace Company had a right to do under the laws of Virginia,) and the attachment so levied had been of such an amount that the attached property when sold would not bring sufficient to pay all liens; then in the bankruptcy proceedings against the Roanoke Furnace Company, that attachment if stricken down would have permitted the present attachments to have been paid in full, while if that attachment was preserved for the estate of the Roanoke Furnace Company to the extent of its amount, the general creditors of the Roanoke Furnace Company, through its trustee, would have priority over petitioner.

Out of this case grows another illustration which shows the fallacy of respondent's contention in this case: suppose the Roanoke Furnace Company had remained solvent and one of its creditors had attached the property in question a day prior to the execution of the deed of November 5, 1900, such creditor must from necessity have made Baird a party to the attachment suit, the legal title being in him, would that

creditors lien have been void? Would it be contended that the lien was upon the property of the bankrupt Baird? If so, this anomaly would be presented: a person not a creditor of a bankrupt who had acquired a valid lien under the state law upon the property of his solvent debtor, having that lien declared void in a bankrupt proceeding instituted to distribute the estate of a third party.

It is further charged in the brief of respondents (p 15) that we contend that the liens referred to in 67-f are those which are upon **the property of the bankrupt**, while they contend that the act uses the word **person**, that it **means person** and that we are endeavoring to re-write the act. We submit that there is no such thing under the bankruptcy act as a creditor acquiring a lien against **the person** of the bankrupt debtor. We further reply that respondents cannot recover under 67-f unless they read out of that section the clause, "and shall pass to the trustee as a part of the estate of the bankrupt." In our opening brief we discussed at some length the proposition, that only those liens were avoided by said section which were upon property, that could pass to the trustee under the other provisions of the act, and as to that proposition we now refer to what was there said. (Brief p 15-19.)

In concluding this hastily prepared reply, it is submitted—

(1) That the property attached when the attachment was levied was not property in which the bankrupt Baird had any beneficial interest whatsoever, but was the property of the Roanoke Furnace Company.

(2) That as of the date the petition was filed, the attached property was not property which Baird could have conveyed or that could have been reached by judicial process against him at the instance of any creditor.

(3) That the property attached was not property which could pass to the trustee of the bankrupt as a part of his estate.

(4) That no preference will be given petitioner if it be permitted to collect the full amount of its attachment, since such collection will not be made out of the estate of the bankrupt.

Respectfully submitted,

S. HAMILTON GRAVES.

Counsel for Petitioner.